

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	
FM Broadcast Stations.)	
(Tullahoma, Tennessee and)	MM Docket No. 00-64
Madison, Alabama))	RM-9117
)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 3, 2003

Released: September 5, 2003

By the Assistant Chief, Audio Division:

I. INTRODUCTION

1. At the request of Tennessee Valley Radio, Inc. ("petitioner"), licensee of WUSX(FM), Channel 227C1, Tullahoma, Tennessee, the Audio Division has before it the *Notice of Proposed Rule Making* ("Notice"),¹ proposing the reallocation of Channel 227C1 from Tullahoma, Tennessee to Madison, Alabama, and the modification of the WUSX(FM) license accordingly.² Petitioner subsequently modified its proposal in reply comments, proposing, in addition to the reallocation, its downgrade from Channel 227C1 to 227C2 and the relocation of the proposed transmitter site in order to provide 100 percent city-grade coverage to the recently-expanded city limits of Madison.

2. The proposed reallocation was filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.³ In evaluating a proposal, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.⁴ The FM allotment

¹ 15 FCC Rcd 6189 (M.M.Bur. 2000).

² During the pendency of this proceeding, the call sign for this station changed from WPZM to WUSX. To avoid confusion, the new call letters will be used in all references to the pleadings and the issues raised in this proceeding.

³ See *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("*Change of Community*").

⁴ See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982), *recon. denied*, 56 RR 2d 448

priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

II. BACKGROUND

A. COMMENTS

3. Petitioner filed comments in support of the reallocation proposal set forth in the *Notice*. In its comments, petitioner states that the proposed reallocation would not leave Tullahoma without its own local service and would give Madison its first local FM service. The petitioner argues that, under priority four, public interest benefits support reallocation to provide local service to Madison, the community with the greater population.

4. STG Media, LLC (“STG”) also filed comments in the proceeding. STG argues that the reallocation of WUSX(FM) from Tullahoma to Madison would provide only a second local service to Madison, triggering the fourth and lowest allotment priority, other public interest matters. STG points out that WUSX already provides service to Madison. Moreover, STG contends that the proposed reallocation would violate Section 73.315(b) of the Commission’s rules because WUSX would not be able to provide line-of-sight coverage over Madison. In support of that assertion, STG submitted a technical study demonstrating that Wade Mountain and Drake Mountain would cause significant obstructions from the WUSX(FM) transmitter site to Madison.

5. In its reply comments, petitioner criticizes STG’s technical study, noting that STG, in attempting to show lack of service to Madison, relied on only one radial emanating from the WUSX(FM) transmitter site. Petitioner nonetheless concedes that, under the proposal described in the *Notice*, WUSX(FM) would be unable to provide line-of-sight service to all of Madison.⁵ Petitioner therefore proposes to downgrade WUSX(FM) from a Class C1 to a Class C2 station and to move its transmitter site closer to Madison. The revised proposal, petitioner explains, would allow WUSX(FM) to remain in compliance with all spacing requirements and to provide city-grade coverage to the entire community of Madison.

6. In its reply comments, STG represents that Madison receives service from at least 31 radio stations. STG also points out that a comparative analysis is not limited to comparison of the respective populations of the two communities, citing *Jefferson City, Cumberland Gap, Elizabethton, Tennessee, and Jonesville, Virginia*.⁶ Finally, STG submitted additional technical information demonstrating that three mountains block the line-of-sight between the WUSX(FM) transmitter and Madison.

(1984).

⁵ In an attached exhibit, petitioner’s engineering consultant explained that a January 2000, map of Madison, obtained in preparation of the reply comments, indicated that not all of the Madison city limits were contained within the actual predicted 70 dBu contour, as petitioner had thought.

⁶ 13 FCC Rcd 2303 ((M.M.Bur.1998).

B. POST-COMMENT MOTIONS AND PLEADINGS

7. Following the submission of reply comments, STG filed a motion seeking dismissal of the rulemaking petition as defective for failing to comply with Sections 73.315(a) and (b) of the Commission's rules at the time that the *Notice* was adopted. In the alternative, STG asks that the petitioner's reply comments be dismissed as an untimely counterproposal in this proceeding. STG seeks leave to file its motion, arguing that the new facts contained in petitioner's reply comments constitute good cause for acceptance of the motion.

8. STG contends that the petitioner's presentation of a revised proposal in its reply comments deprived the public of the ability to file counterproposals representing preferential arrangements of allotments. STG explains that any counterproposal submitted in response to the *Notice* would have had to protect Station WUSX's present transmitter site, which petitioner now proposes to change. STG also argues that the filing of the revised reference coordinates in petitioner's reply comments precluded effective public comment on the proposal. STG further notes that the petitioner did not provide a gain and loss study because the original proposal did not involve a change in transmitter site.

9. Petitioner filed a request for an extension of time to respond to STG's motion, asking that it be permitted to submit its opposition 30 days, rather than 10 days,⁷ from the filing date of STG's motion.⁸ In petitioner's subsequent opposition to STG's motion, petitioner asks that the motion be dismissed because it was filed thirty days after the deadline for submission of reply comments. Petitioner argues that STG's motion must be stricken from the record because it was an unauthorized filing that was not specifically requested by the Commission.

10. Petitioner disputes STG's characterization of the petition for rulemaking as defective, explaining that the boundaries of the City of Madison were extended in March 1998, approximately ten months after the petition for rule making was filed. Petitioner states that its engineer first obtained an updated city map for Madison after STG raised the line-of-sight issue in its comments. In light of that new information, petitioner states that it took the reasonable step of modifying its proposal in its reply comments. For that reason, petitioner argues, the modified proposal was not an untimely counterproposal, because the Commission permits petitioners to modify their proposals in reply comments to remedy conflicts and to respond to new issues raised in comments.

11. In its opposition to STG's motion, petitioner also addresses the substantive merits of its proposed reallocation, arguing for the first time that reallocation of WUSX(FM) to Madison would constitute a priority three allotment because it would result in the allotment of a first local fulltime service. Petitioner bases that argument upon its representation that WUMP, an AM station licensed in Madison, provides only daytime service. Finally, petitioner included with its opposition a gain/loss study, not previously

⁷ See 47 C.F.R. § 1.45(a).

⁸ Petitioner explained that it had not received a service copy of STG's motion and that the certificate of service for the motion showed the wrong address for petitioner's counsel. Petitioner also stated that additional response time was necessary due to prior commitments on the part of petitioner's consulting engineer.

submitted in the proceeding. Based on that study, petitioner asserts that 70 percent of the current population, and 68 percent of the current service area, would continue to receive the same level of service from Station WUSX. In addition, petitioner states that 96 percent of the loss area would continue to receive service from four or more FM stations.

III. DISCUSSION

A. PROCEDURAL ISSUES

12. We grant both STG's request for leave to file its motion and petitioner's request for extension of time to submit its response to the motion, and we deny petitioner's request to strike STG's motion. We agree with STG that the revisions contained in petitioner's reply comments warrant acceptance of STG's motion. We also find good cause to grant petitioner's requested extension of time to respond to the motion. The mistake in the service address for petitioner's counsel, as well as the more general benefit of basing our ruling upon a complete record, warrant the brief extension of time requested by the petitioner.

13. In its motion, STG first seeks dismissal of the petition for rulemaking based upon an alleged failure to comply with Sections 73.315(a) and (b) of the Commission's rules. In general, we do not allow a party to change the originally proposed reference coordinates in order to create a conflict with its earlier filed proposal, absent a substantial justification based on new and reasonably unforeseeable intervening events.⁹ We find that such justification exists with respect to petitioner's proposal in this proceeding. The circumstances of this case differ from those of *Noblesville*, where a change in the allotment request was proposed after one of the petitioners assumed ownership of a nearby station. In that situation, the petitioners clearly anticipated the intervening event that prompted them to revise the original allotment proposal. In contrast, in this proceeding petitioner amended its proposal to reflect a change in the borders of the City of Madison, an event that was "reasonably unforeseeable" to petitioner. We therefore deny STG's motion to dismiss the petition for rulemaking for failure to comply with Section 73.315 of the Commission's rules.

14. STG asks, in the alternative, that petitioner's reply comments be stricken as an untimely counterproposal. We agree with STG that the timing of petitioner's revised proposal is an issue of significant concern because the downgrade and change of transmitter site would have different preclusive effects than the original proposal. Nevertheless, it is not necessary to rule on this request because, as discussed below, we are denying the revised proposal on the merits. Therefore, the motion to strike petitioner's reply comments is moot.

⁹ *Noblesville, Indianapolis, and Fishers, Indiana*, MM Docket No. 01-143, DA 03-1118 (M.Bur., rel. May 30, 2003), citing *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21,191 (M.M.Bur. 2001).

B. PROPOSED ARRANGEMENT OF ALLOTMENTS

15. In considering a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures.¹⁰ Petitioner has asserted that reallocation of WUSX to Madison would constitute a first fulltime local service, and is therefore entitled to consideration as a priority three allotment. We do not agree. Commission records indicate that WUMP(AM) operates at 1,000 watts during daytime hours and at 129 watts during nighttime hours. Because WUMP's authorized nighttime power is less than 250 watts, petitioner is correct that WUMP should be considered a daytime-only station.¹¹ Petitioner is not, however, correct that this circumstance entitles Madison to an allotment preference under priority three. Priority three applies only when an allotment would afford a community a first local aural service. An allotment that would result in the first fulltime local service to a community that already has a daytime station is evaluated under priority four, other public interest matters, because "both daytime and full-time AM stations [are considered] local aural transmission services."¹² Accordingly, we reject petitioner's contention that the proposed reallocation of Station WUSX to Madison would constitute a priority three allocation.¹³

16. Evaluating both Tullahoma and Madison under our FM allotment priorities, we conclude that neither community qualifies for a first, second, or third priority. Both communities currently receive numerous aural services, so neither priority one nor two is applicable, and both communities currently have a first local service other than the service (or potential service) provided by Station WUSX,¹⁴ so priority three would not be triggered with respect to either community. This determination is consistent with our earlier statements in the *Notice of Proposed Rule Making*, wherein we noted that the proposed reallocation would result in a second local transmission service for Madison, triggering priority four.¹⁵

¹⁰ See *Change of Community*, *supra*.

¹¹ See *Fredericksburg, Helotes and Castroville, Texas*, 10 FCC Rcd 6580, 6582, n.8 (M.M.Bur. 1995). Despite the fact that WUMP(AM) is classified as a daytime only station on the basis of its power, WUMP(AM)'s nighttime service provides an interference-free city grade signal over most of Madison. See *Comments of STG Media, LLC* at 4.

¹² *Change of Community*, 5 FCC Rcd at 7097. See also *Fredericksburg*, *supra*, 10 FCC Rcd at 6582.

¹³ Our determination that WUSX would not provide a first local service to Madison, which is already served by WUMP, obviates the need for a *Tuck* analysis. If Madison did not already have a local aural service, a *Tuck* analysis would be necessary to determine whether Madison, located within the Huntsville urbanized area, is sufficiently independent of Huntsville to warrant a priority three preference. *RKO General, Inc.*, 5 FCC Rcd 3222 (1990); *Fay and Richard Tuck*, 3 FCC Rcd 5374 (1988).

¹⁴ Tullahoma is served by WJIG(AM), which is classified as a daytime station because its nighttime power is less than 250 watts, and by WTML and WUAT, both noncommercial educational FM stations.

¹⁵ *Tullahoma, Tennessee and Madison, Alabama*, 15 FCC Rcd 6189, 6191 (M.M.Bur. 2000).

Accordingly, the proposed reallocation must be considered under priority four.

17. Under the fourth allotment priority, competing proposals are compared on the basis of the availability of aural services in the service area, the number of local services, the population served, and other factors relevant to the public interest.¹⁶ The most recent information available from the U.S. Census Bureau shows Madison and Tullahoma to have populations of 32,335 and 18,304 persons, respectively.¹⁷ Madison, the larger community, has only one local service, a daytime AM station, and no local FM service, while Tullahoma has a daytime AM station and two noncommercial educational FM stations, WTML and WUAT, in addition to Station WUSX. That is not the end of our inquiry, however; there are several other factors relevant to a determination of the public interest, and we turn now to discussion of those issues.

18. Although most of the loss area would remain well-served under petitioner's revised proposal, a small portion of the loss area, consisting of 25 square kilometers and 337 persons, would be left with only four aural reception services. In contrast, all portions of the proposed new service area already are well-served by aural reception services. Moreover, adoption of the proposal would result in a large net loss in both coverage area and population served.¹⁸ Our gain-loss analysis found that petitioner's revised proposal would result in a loss of 8,126.7 square kilometers and a gain of only 245.2 square kilometers, for a net loss of 7,881.5 square kilometers.¹⁹ Similarly, the proposal would cause a loss of 191,795 persons served and a gain of only 26,993 persons, for a net loss of 164,802 persons served.²⁰ We find that the creation of an underserved area, as well as an extremely large net loss in the area and the number of persons served, are significant disadvantages of petitioner's revised proposal.

¹⁶ See *Revision of FM Assignment Policies and Procedures*, 90 FCC2d at 92, n.8.

¹⁷ Population Division, U.S. Census Bureau, *Table SUB-EST2002-04-01-Alabama Incorporated Places with Population over 10,000, Ranked by July 1, 2002 Population: April 1, 2000 to July, 2002* and *Table SUB-EST2002-04-47-Tennessee Incorporated Places with Population over 10,000, Ranked by July 1, 2002 Population: April 1, 2000 to July 1, 2002* (Release Date: July 10, 2003).

¹⁸ See *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580, 6586, n.40 (M.M.Bur. 1991). See also *Potts Camp and Slatton, Mississippi*, 13 FCC Rcd 11909 (M.M.Bur. 1998) (loss of service in entire service area, not just community of license, was considered in denying reallocation to larger community).

¹⁹ Petitioner's gain-loss study shows that Station WUSX's downgrade and relocation of its transmitter site would result in a loss of 8,254.5 square kilometers and a gain of 224.2 square kilometers, for a net loss of 8,030.3 square kilometers.

²⁰ Petitioner's study shows a loss of 186,597 persons served and a gain of 12,101 persons, for a net loss of 174,496 persons served.

19. The loss in coverage from the amended proposal is largely due to the downgrade of Station WUSX to Class C2 status. As we explained in *Eatonton*, the retention of a higher channel grade “should be considered as a benefit of retaining the present arrangement of allotments.”²¹ In addition, we also may consider the potential disadvantage that could result from disrupting WUSX’s existing service. The Commission has stated that “[t]he public has a legitimate expectation that existing service will continue,” and the weight to be accorded that public expectation is substantial.²² More than 190,000 persons who currently have an expectation of continuing service from Station WUSX would lose that service if petitioner’s revised proposal were adopted.

20. It is also significant that Madison is located within the Huntsville Urbanized Area while Tullahoma is approximately 35 miles from Murfreesboro, the nearest principal business center. In previous cases, we have considered relative proximity to an urban area in rejecting reallocation requests that would remove an existing service from a more remote community to one closer to an urban area.²³ In this instance, Madison’s location allows it to receive transmissions from numerous stations licensed throughout the Huntsville Urbanized Area. It is, in fact, undisputed that Madison receives a greater number of aural services than Tullahoma.²⁴ Moreover, Station WUSX currently provides service to most of Madison and the area surrounding it. We conclude that the proposed reallocation and change of community of license would not serve the public interest.

IV. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, That the request of STG Media, LLC, for permission to file a motion in this proceeding on July 18, 2000, IS GRANTED, and the request of Tennessee Valley Radio, Inc., to strike the motion of STG Media, LLC, IS DENIED.

22. IT IS FURTHER ORDERED, That the request of Tennessee Valley Radio, Inc. for an extension of time to respond to the afore-referenced motion, IS GRANTED.

²¹ *Eatonton*, 6 FCC Rcd at 6586, n.39.

²² *Eatonton*, 6 FCC Rcd at 6586, citing *Change of Community*, 5 FCC Rcd at 7097, and *Pillar of Fire*, 62 RR2d 276 (1987).

²³ See *Bronson and Cross City, Florida*, 10 FCC Rcd 8102 (M.M.Bur. 1995), and *Fredericksburg*, *supra*.

²⁴ STG stated in its Comments that Madison receives 14 aural services and Tullahoma receives 5 aural services. In its Reply Comments, STG revised its calculations, claiming that Madison receives service from at least 31 radio stations, whereas Tullahoma receives service from only 10 radio. In its Comments, petitioner stated that Tullahoma receives service from 16 radio stations. Petitioner made no representation regarding the number of stations providing service to Madison other than to say that it is five or more. Our own analysis has determined that Madison receives at least 17 FM aural services and 5 AM aural services while Tullahoma receives at least 10 FM aural services and 3 AM aural services, although portions of Station WUSX’s current service area receive fewer services. See further discussion in text above.

23. IT IS FURTHER ORDERED, That the request of STG Media, LLC, seeking dismissal of the Petition for Rule Making filed by Tennessee Valley Radio, Inc., IS DENIED, and the alternative request of STG Media, LLC, to strike from the record the Reply Comments of Tennessee Valley Radio, Inc., IS DISMISSED as MOOT.

24. IT IS FURTHER ORDERED, That the proposal to amend the FM Table of Allotments, as set forth in the petition for rulemaking filed by Tennessee Valley Radio, Inc., on May 30, 1997, and amended in its reply comments filed on June 14, 2000, IS DENIED.

25. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

26. For further information concerning this proceeding, contact Deborah A. Dupont, Mass Media Bureau, (202)418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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